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IN THE

Supreme Court of the United States

October Term, 1941

No. 223

INTERSTATE COMMERCE COMMISSION AND THE PACIFIC ELECTRIC RAILWAY COMPANY,
Appellants,

vs.

RAILWAY LABOR EXECUTIVES' ASSOCIATION AND BROTHERHOOD OF RAILROAD TRAINMEN,
Appellees.

BRIEF OF APPELLEES

FRANK L. MULHOLLAND,
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INDEX

TABLE OF CITATIONS

Cases Cited

MISCELLANEOUS CITATIONS

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Statement of the Case

This case comes before this court on appeal from a decision of a three-judge statutory court convened in the District of Columbia, which decision set aside an order of the Interstate Commerce Commission.

The facts out of which the issues of the case arise are briefly these: The appellant, Pacific Electric Railway Company, filed an application with the Interstate Commerce Commission for the issuance of a certificate of public convenience and necessity, authorizing it to abandon certain

of its rail lines in and near the City of Los Angeles, California. The contemplated abandonment was not to constitute a withdrawal of the applicant from the transportation field in this area or in any part of it. It was rather a phase of a more comprehensive program designed to bring about a rearrangement of the rail, motor bus, and motor truck service of the carrier in such manner as to enable it to render transportation service to the same communities as before, but with a higher net return from its total operations. (R. 53-54.)

The appellees entered their appearance at the hearings conducted by the Interstate Commerce Commission and urged that if the requested certificate should be granted, it should be made subject to conditions which would afford a measure of protection to those employees who would lose their positions as a result of the contemplated abandonment. This contention was predicated upon the language of Section 1(20) of the Interstate Commerce Act (U. S. C. Title 49, Section 1, Paragraph (20)), which provides that in cases of this kind, the Commission "may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The Commission, acting through its Division 4, authorized the issuance of a certificate to the applicant but refused to attach thereto any conditions for the protection of employees. This refusal was on the ground that it lacked jurisdiction to impose such conditions under the statutory language just quoted. (*Pacific Electric Railway Company Abandonment*, 242 I. C. C. 9.)* A petition for reargument before the full Commission was denied, and this action was filed seeking to set aside the decision to the

* One of the three commissioners in Division 4 dissented as to the existence of jurisdiction in the Commission to impose conditions for the protection of employees.

extent that it disclaimed jurisdiction to impose or to consider the imposition of conditions for the protection of employees. The three-judge court reversed the Commission, and granted the relief asked in the complaint. (*Railway Labor Executives' Association et al. vs. United States et al.*, 38 Fed. Supp. 818.) As above stated, the case comes to this court on direct appeal.

The single issue presented by the appeal is this: In abandonment cases filed under Section 1(18-20) of the Interstate Commerce Act, does the Interstate Commerce Commission have jurisdiction under the statute to impose conditions for the protection of employees who will be injuriously affected?

It is, of course, the contention of the appellees that the Commission has the jurisdiction which it disclaimed; that in the complete exercise of its statutory authority in relation to abandonment cases, it is obligated to give consideration to the effects of the proposal upon employees, and that it is further obligated to explore the possibilities of alleviating those effects by protective conditions appropriate under the circumstances.

We wish to make it very clear that while specific conditions were proposed to the Commission in this case, we do not contend that the Commission is obligated to impose those conditions or any other specific conditions in this or any other case. There may be abandonment cases where protective conditions cannot properly be imposed at all. There may be cases where certain conditions for employee protection are appropriate and are required by the public convenience and necessity, while in other cases, these conditions would be inappropriate. We seek to impose no iron-clad rule upon the Commission in this regard. We do insist, however, that it has jurisdiction to consider this phase of the public convenience and necessity; that, having

the authority, it is obliged to give it such consideration as the facts of the case warrant, and that its failure so to do amounts to an incomplete exercise of its statutory authority and an error of law.

In supporting our position, we will, in the first place, look to the statutory language and will show that the public convenience and necessity which the statute contemplates includes a reasonable protection to employees from the injurious effects of abandonments of rail lines. In this connection, we will call particular attention to the case of *United States vs. Lowden*, 308 U. S. 225, which established that employee protection was available under the similar language of Section 5(4) of the Interstate Commerce Act (as it existed prior to the recent amendment) by virtue of the authority there given to the Commission to impose just and reasonable conditions in the public interest in cases where authority was sought to effect consolidations of carriers. We will show that no reasonable distinction can be drawn between the public convenience and necessity and the public interest in this regard.

In the second place, we will examine a line of decisions by the Interstate Commerce Commission wherein conclusions were reached similar to that reached by it in the present case and contrary to the position of the appellees and the lower court. We will show that these decisions are not such as to be controlling upon the courts in this case.

Lastly, we will examine the history of the Interstate Commerce Act after the Commission's interpretation of Section 1(20) was announced, and will consider the significance to be attached to the fact that Congress has not since amended this section. In this connection, we will give particular attention to the legislative proceedings which preceded the enactment of the Transportation Act of 1940. We will show that there were no developments during this

period which can properly be considered as a legislative ratification of the Commission's construction of the statute.

Reduced to outline form, these contentions are as follows:

I. Public convenience and necessity in relation to the abandonment of rail lines includes a reasonable protection of the interests of employees.

II. The administrative interpretation given to Section 1(20) of the Interstate Commerce Act by the Interstate Commerce Commission is entitled to no weight in this case.

III. The Congress has never ratified the interpretation given by the Commission to Section 1(20) of the Interstate Commerce Act.

Argument

I. PUBLIC CONVENIENCE AND NECESSITY IN RELATION TO THE ABANDONMENT OF RAIL LINES INCLUDES A REASONABLE PROTECTION OF THE INTERESTS OF EMPLOYEES.

The word "abandonment," as applied to railroad lines, raises a mental picture of a small railroad company struggling against hopeless economic odds and finally surrendering its franchise because of its inability to earn operating expenses. Only a small proportion of abandonment applications, however, present such a situation. Most of them are filed by comparatively large and prosperous companies who seek to rid themselves of unprofitable branches or secondary lines. This type of abandonment does not represent the economic demise of the applicant. Frequently, it does not even contemplate the withdrawal by it from transportation activities in the area served by the abandoned line, for in most instances, the applicant intends to continue to render service either by other rail lines or by motor buses or trucks operated by it or a subsidiary company.

Every abandonment, of course, must be justified by a showing that "the present or future public convenience and necessity permit of such abandonment." (Interstate Commerce Act, Section 1(18), U. S. C. Title 49, Section 1, Paragraph (18).) In cases where the abandonment of individual segments of large railroad systems has been permitted, this public convenience and necessity has been found in the fact that the discontinuance of the line will free an instrumentality of commerce from the unreasonable burden of its continued maintenance and operation. With this reasoning, we have no quarrel. We point out, however, that the public convenience and necessity are served in such instances only as the indirect result of strengthening the operating and financial position of the applicant, a corporation operated for private profit. Any improvement in the condition of such a corporation results, therefore, in a private benefit as well as a public one, and in fact, the former is considered as a necessary prerequisite to a realization of the latter.

While the private interests represented by railroad management are benefited by such abandonments, and through them, the public is also held to be benefited, there is another side of the picture. Those railroad employees who have found their employment on the abandoned line are undeniably harmed by its discontinuance. They may be deprived of employment altogether. Even if employment opportunities are found for them elsewhere, the acceptance of such opportunities is frequently at the expense of uprooted homes or the severance of life-long social and economic ties. Other railroad employees working on other lines of low traffic density which might conceivably be marked for abandonment cannot but feel that their own employment is unsure. If no policy is adopted whereby their interests may be accorded a reasonable protection, the result is necessarily a lowered morale among the skilled

workers upon whose services the railroad industry relies so heavily.

The Interstate Commerce Commission, therefore, has taken an illogical and inconsistent position. It recognizes that the private benefit to the railroad company results in the strengthening of the company as an operating unit and considers that the public is benefited thereby. It fails to recognize, however, that the weakening of the economic position of railroad employees, while a private detriment to them, reacts just as surely upon the public by lowering the operating efficiency of the men by whom transportation services are actually performed. This failure to accord due recognition to the public concern in the welfare of those who serve the nation's transportation system is the basis of the appellees' complaint in this case.

The conclusions just stated do not depend for their support upon abstract social theories alone. On the contrary, they are drawn directly from the opinion of this court in the case of *United States vs. Lowden, supra.* Inasmuch as the argument of the appellees relies rather heavily upon the cited case, it is desirable to examine in some detail the opinion and the statutory language upon which it is based.

The *Lowden* case construed Section 5(4) of the Interstate Commerce Act (as it read prior to the recent amendments incorporated by the Transportation Act of 1940) rather than Section 1(18-20). Section 5(4) and Section 1(18-20) of this Act, however, are (or were) analogous sections. Each was designed to require approval from the Interstate Commerce Commission as a prerequisite to certain proposed changes in the operations of carriers. Section 5(4) dealt with consolidations, while Section 1(18-20) deals with constructions and abandonments. Section 5(4) provided that the Commission's discretion was to be ex-

ercised according to the standard of "public interest," while Section 1(18-20) employs the phrase "public convenience and necessity." Section 5(4) provided that "if * * * the Commission finds that, subject to such terms and conditions * * * as it shall find to be just and reasonable, the proposed consolidation; * * * will promote the public interest, it may enter an order approving and authorizing such consolidation, * * * upon the terms and conditions * * * so found to be just and reasonable." Section 1(20) (as above noted) contains the provision that "the Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, * * * and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

The most obvious and outstanding difference in language between these sections of the statute is to be found in the fact that Section 5(4) provided that the Comission might attach such conditions to an order issued thereunder as were "just and reasonable." It did not provide directly that the *conditions themselves* must be in the "public interest" but stated that if the Commission found that the proposed *consolidation* was in the public interest, it should approve "upon the terms and conditions * * * found to be just and reasonable." Section 5(4) was therefore open to the possible interpretation that the Commission might impose conditions which were not related to the public interest, but which were nevertheless just and reasonable and germane to the subject matter of the transaction. Section 1(20) is not susceptible to such an interpretation as it provides specifically that any conditions imposed must be such as "the public convenience and necessity may require." If, therefore, it should develop that the decision of this Court in the *Lowden* case was predicated upon the

phrase "just and reasonable" in Section 5(4), a basis of distinction might be established between the two statutory provisions. If, however, it should appear that the Court disregarded the phrase "just and reasonable," assumed that all conditions imposed under Section 5(4) must accord with the standard of public interest, and still found that jurisdiction existed in the Commission to impose conditions for the protection of employees, then the omission of the phrase "just and reasonable" from Section 1(20) is unimportant, and the only significant distinction between the language of the two sections is that to be found from the use of the phrase "public convenience and necessity" in the one, and "public interest" in the other. An examination of the opinion will reveal that the Court in fact proceeded on the second of the two theories above noted. The language used by the Court leaves no doubt on this point. It stated the issue before it thus:

> "Accepting the premise, as we may for present purposes, without considering the contention of the Commission that the conditions if just and reasonable, need not be related to the other statutory standards, the issue is narrowed to a single question whether we can say, as matter of law, that the granting or withholding of the protection afforded to the employees by the prescribed conditions can have no influence or effect upon the maintenance of an adequate and efficient transportation system which the statute recognizes as a matter of public concern." (*U. S. vs. Lowden*, 308 U. S. 225, 231.)

In considering the issue thus stated, the Court used the following language:

> "The security holders are usually, though not always, favorably affected by economies resulting from consolidation. But the Commission has estimated in its report on unification of the railroads that 75% of the savings will be at the expense of railroad labor. Not only must unification result in

wholesale dismissals and extensive transfers, involving expense to transferred employees, but in the loss of seniority rights, which, by common practice of the railroads are restricted in their operation to those members of groups who are employed at specified points or divisions. It is thus apparent that the steps involved in carrying out the congressional policy of railroad consolidation in such manner as to secure the desired economy and efficiency will unavoidably subject railroad labor relations to serious stress and its harsh consequences may so seriously affect employee morale as to require their mitigation both in the interest of the successful prosecution of the congressional policy of consolidation and of the efficient operation of the industry itself, both of which are of public concern within the meaning of the statute." (P. 233.)

After calling attention to various efforts, both private and governmental, to improve the position and status of railroad employees in various connections, the Court continued:

"In the light of this record of practical experience and congressional legislation, we cannot say that the just and reasonable conditions imposed on appellees in this case will not promote the public interest in its statutory meaning by facilitating the national policy of railroad consolidation; that it will not tend to prevent interruption of interstate commerce through labor disputes growing out of labor grievances, or that it will not promote that efficiency of service which common experience teaches is advanced by the just and reasonable treatment of those who serve." (P. 238.)

Thus, the decision in the *Lowden* case is undoubtedly to the effect that the Commission had full authority under Section 5(4) to impose conditions in consolidation cases for the protection of employees as a matter of general public interest and not pursuant to any special authority conferred upon the Commission by that portion of the Sec-

tion which authorizes the imposition of "just and reasonable" conditions. In light of the language of this decision, therefore, the only possible argument now open to the appellants as a basis of distinction between Section 1(18-20) and Section 5(4) is that there is some fundamental difference between the public interest and the public convenience and necessity which distinguishes this case from the *Lowden* case. Such a contention is indeed raised in the briefs of the appellants. An examination, however, of the distinction which they claim will reveal that it has no valid basis.

Neither of the two phrases under consideration has a restricted or technical meaning. Both were introduced into the Interstate Commerce Act by amendments enacted as a portion of the Transportation Act of 1920. This statute marked a significant change in the history of federal railroad regulation, a change from a policy limited to the prevention of abuses and discriminatory rates to one contemplating the development of adequate transporation service. (*Akron, Canton & Youngstown Railway Company vs. United States*, 261 U. S. 184). This new policy was sought to be implemented by requiring approval by the Interstate Commerce Commission of many changes in operating practices theretofore subject to state regulation or left to the uncontrolled discretion of private management. Among the practices so regulated were those relating to the consolidation of carriers, the extension or abandonment of lines, the issuance of securities, the maintenance of interlocking directorates, and others. For each of these practices, the approval of the Commission was required. Standards were established according to which the discretion of that body should be exercised. These standards were "public interest" in the case of consolidations (Section 5(4)), the issuance of securities (Section 20a(2)), and interlock-

ing directorates (Section 20a(12)), while the standard of "public convenience and necessity" was established in the case of extensions and abandonments (Section 1(18-20)). Comparison should be made also with the standard of "interest of the public and * * * advantage to the convenience and commerce of the people," which was established for Commission action by the Panama Canal Act (Interstate Commerce Act, Section 5(21)), and that of "interest of the public and the commerce of the people" set up by the Car Service Act (Interstate Commerce Act, Section 1(15)), two statutes which were passed just prior to the Transportation Act of 1920.

It is at once apparent that the standard of administrative action outlined by each of the quoted phrases is one which contemplates the exercise of a broad administrative discretion. Taken alone, no one of them evidences an intent to establish a basis of decision which must be applied with technical exactness. Throughout, the thought is clearly expressed that henceforth, the public welfare rather than private benefit is to control in relation to the operating practices of the railroads. Slight differences in the language whereby this thought is expressed cannot be held to create significant differences in meaning between standards so broadly and generally stated.

The conclusion above reached has received authoritative recognition by courts and commentators in relation to the meaning to be attached to the phrase "public convenience and necessity." Thus, Professor Sharfman, in his monumental work entitled "The Interstate Commerce Commission," makes the following statement:

> "In the field of extensions and abandonments, which bears upon the problem of service as well as upon that of management, the usual procedural safeguards are provided, coupled, as in the matter of security issues, with a requirement of express notice

to the state authorities concerned; but the substantive power vested in the Commission confers, by its very terms, an almost unrestricted charter for the exercise of administrative discretion. The construction and operation of new lines, by way of extension or otherwise, and the abandonment of the whole or any portion of existing lines, or of their operation, are made dependent upon the issuance by the Commission of a certificate 'that the present or future public convenience and necessity require or will require' the new construction, extension or operation, or of a like certificate 'that the present or future public convenience and necessity' permit of the abandonment. No further guide to the required administrative action is provided. On the contrary, the discretionary character of the Commission's authority is accorded added recognition; for it is not only empowered to grant or deny the certificate as prayed for, but may issue it 'for a portion or portions' of the line of railroad embraced in the application, or 'for the partial exercise only of such right or privilege,' and it may attach to the issuance of the certificate 'such terms and conditions as in its judgment the public convenience and necessity may require.' And the Commission's authority to *order* the extension of lines and the acquisition of facilities, by way of exercise of positive power toward the provision of adequate service, likewise involves a large measure of administrative discretion. It is true that the Commission's action, which may result from a proceeding instituted on its own initiative, is conditioned upon findings, 'as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension of facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public'; but these limitations, in essence, but set up the usual standard of '*public interest*,' and thus leave the determination of concrete policy to the judgment of the administrative tribunal." (Vol. II, pp. 361-362.) (Emphasis supplied.)

The same thought was well expressed by one of the lower federal courts in the case of *Lancaster vs. Gulf, Colorado & Santa Fe Railway Company*, 298 Fed. 488, 491, when, in referring to Section 1(18) of the Interstate Commerce Act, it said:

> "The purpose there expressed (is) to make the public good, rather than the competitive instinct of railroad companies the determining factor * * *."

If some distinction exists between the public interest and the public convenience and necessity, what is the nature of that distinction? It will not suffice to say that the one embraces employee protection while the other does not, for this is a mere question-begging re-statement of the appellants' position. To establish the existence of the distinction which the appellants assert, it is necessary to show some fundamental difference in the thought expressed by the two phrases which gives rise to that distinction. So far, during the history of this case, appellants have been unable to point to such a fundamental difference, nor do we believe that they can do so. What factor is inherent in the public interest which is not also inherent in the public convenience and necessity? Would the Commission have a larger measure of administrative discretion in relation to abandonments if the standard for its decisions was expressed to be that of the public interest? Is it possible that a certain decision might be required by the public interest, yet not required by the public convenience and necessity? Is it conceivable that a proposed transaction might be considered as required by the public convenience and necessity, and yet be contrary to the public interest?

There is no magic in the phrase public convenience and necessity. It is merely the mode of expression which for many years has been used to characterize the interest of the public as related to the establishment, extension or abandon-

ment of public utilities. When Congress came to treat of these subjects in relation to the railroads, it naturally adopted a phraseology already applied in other fields.

Both the Commission and the courts have recognized the absence of any fundamental difference between the two phrases under consideration by using them interchangeably. Thus, in *Louisiana, Arkansas & Texas Railway Company Operation*, 170 I. C. C. 602, in a proceeding filed under Section 1(18-20), the Commission stated the issue before it thus:

> "But in considering whether a certificate shall issue upon the application presented, we are called upon to consider not only the interest of the parties immediately concerned but the *general public interest* with due regard to other provisions and requirements of law." (Emphasis supplied.) (p. 606.)

The Supreme Court of the United States in a case involving an application for a certificate to permit construction of a new line filed under this same section, stated the purpose of the statutory provision thus:

> "Undoubtedly the purpose of these provisions is to enable the Commission, *in the interest of the public*, to prevent improvident and unnecessary expenditures for the construction and operation of lines not needed to insure adequate service." (Emphasis supplied.) (*C. & O. R. Co. vs. U. S.*, 283 U. S. 35, 42.)

In the similar case of *Texas & New Orleans Railroad Company vs. North Side Belt Railroad Company*, 276 U. S. 479, the court made the following statement:

> "The purpose of paragraphs 18 to 22 is to prevent interstate carriers from weakening themselves by constructing or operating superfluous lines, and to protect them from being weakened by another carrier's operating in interstate commerce a competing line not required in the *public interest*."

See also *Atlantic Coast Line R. Co. vs. U. S.*, 284 U. S. 288, 295, where the court in several instances refers to the "public interest" as the controlling factor in cases filed under Section 1(18-20) of the Interstate Commerce Act.

These instances of the employment of the phrase "public interest" in connection with proceedings filed under Section 1(18-20) are not examples of a careless use of language. They constitute rather a recognition of the fact that, underlying *all* of the provisions of the Interstate Commerce Act, is a *single* governmental policy. Whether this policy be phrased in terms of "public interest" or "public convenience and necessity," is immaterial. The policy itself and the jurisdiction exercised by the Commission in effectuating it is basically the same.

By way of summary of the above, we have shown that the decision in *U. S. vs. Lowden* establishes that employee protection is a phase of the public interest which the Interstate Commerce Commission may appropriately consider in consolidation cases, and that no basis of distinction exists in principle between the scope of the public interest and that of the public convenience and necessity as applied to abandonments.

In addition to this identity in principle as between the applicable statutory provisions, there exists a high degree of similarity as to the practical results secured from consolidations and abandonments themselves. This fact is perhaps more relevant to the question of the extent to which jurisdiction should be exercised by the Commission in particular cases than it is to the question of the existence of the jurisdiction itself. However, the court's attention should be called to the fact that there is more in common between consolidations and abandonments than is apparent at first glance.

Every consolidation of railroads has within it the im-

plication of abandonments to come. Consolidations are economy measures. Usually the only way by which the anticipated economies can be realized is from the elimination of duplicate facilities. Such elimination is accomplished by the abandonment of the shops, offices, stations, yards or terminals of one or another of the consolidating roads.

Abandonments, on the other hand, do not necessarily mean the discontinuance of operations by the applicant in other sections of the country, or even in the area served by the line which is to be abandoned.

> "Broadly speaking, applications for abandonments are of two principal types; those incidental to readjustments in plant and service; and those designed to relieve carriers of the burdens of unprofitable operation. The proceedings resulting from the first of these groups of applications can be disposed of very briefly. They are generally initiated for the purpose of increasing efficiency, effectuating economies, or promoting safety, and they contemplate no material diminution in the scope or quality of the service rendered to the patrons and communities involved."
>
> * * * * *
>
> "But in most instances carriers seek permission to abandon their lines, in whole or in part, because of the pressure of unprofitable operation; * * *." (The Interstate Commerce Commission, by Sharfman, Vol. III-A, pp. 331, 332).

Thus, the ultimate end sought in abandonment proceedings is an improvement in the business position of the applicant through the discontinuance of an unprofitable operation for which there may or may not be substituted another and more profitable one.

The practical consequences of consolidations and abandonments are therefore very similar, both in relation to the private parties directly concerned and in relation to the

public. Both seek to strengthen the carriers as transportation agencies and thus benefit the public. Both deprive workers of employment, impair employee morale, endanger labor relations, and thus harm the public. In regard to both, the means are available through systems of displacement allowances and the like whereby employees may be recompensed for their losses during the necessary period of readjustment. Thus, both in relation to consolidations and abandonments, it is possible to compensate labor for its losses out of the gains realized by capital. Where such a system of compensation is applied, the public ultimately secures the full benefit of an improved transportation agency without suffering the detriments which inevitably follow if corresponding losses are left to fall upon the employees alone.

It is, of course, possible that individual cases may arise where the resources of the applicant are so depleted that little or no provision can be made for employees. Such situations may surely be left for their solution to the discretion of the Commission. The existence of jurisdiction to act in a certain field does not imply that such jurisdiction must always be exercised, or always exercised in the same manner.

Accordingly, we conclude from the foregoing that there is no difference in principle between the language of Section 1(18-20) of the Interstate Commerce Act and that of Section 5(4) which can justify the conclusion that a less extensive jurisdiction was conferred upon the Commission by the one section than by the other, and further, that there is no practical difference in the results achieved by virtue of these provisions which can support the conclusion that the Commission is or should be denied a power in relation to abandonments which it possesses in relation to consolidations.

II. THE ADMINISTRATIVE INTERPRETATION GIVEN TO SECTION 1(20) OF THE INTERSTATE COMMERCE ACT BY THE INTERSTATE COMMERCE COMMISSION IS ENTITLED TO NO WEIGHT IN THIS CASE.

It is true that the Interstate Commerce Commission in a series of decisions beginning in 1935 has disclaimed any authority in it to impose conditions for the protection of employees in abandonment cases. It is also true that the courts have held that an administrative interpretation of a statute is entitled to some weight when that statute comes before the courts for consideration. The amount of weight to be attached, however, varies according to the circumstances of individual cases.

Out of the vast number of reported decisions which might be cited in this connection, we have selected four from the reports of this court, not because of any fancied resemblance between their facts and the facts of the case at bar, but because of the legal principles which are there recognized. We direct the court's attention to the following quotations from the opinions in these cases. Citations in the course of the opinion have been omitted and emphasis has been supplied by us in each case:

> "It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. But the court is not bound by a construction so established. *The rule does not apply in cases where the construction is not doubtful.*"
>
> *United States vs. Missouri Pacific R. Co.*, 278 U. S. 269, 280.

> "True indeed it is that administrative practice does not avail to overcome a statute *so plain in its commands as to leave nothing for construction.* True

it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. The practice has *peculiar weight* when it involves a *contemporaneous construction* of a statute *by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.*"

Norwegian Nitrogen Prod. Co. vs. U. S., 288 U. S. 294, 315.

"There is thus a complete absence of those reasons which ordinarily lead courts to give persuasive force to an administrative construction and which justify their acceptance of it in preference to their own. The regulations have not been consistent in their interpretation of the statute and *do not embody the results of any specialized departmental knowledge or experience. No one*, not even the government, *will be prejudiced by its rejection*, and as we have said the construction flies in the face of the purposes of the statute and the plain meaning of its words. Judicial obeisance to administrative action cannot be pressed so far."

Haggar Co. vs. Helvering, 308 U. S. 389, 398.

"Some reliance is placed by appellant on departmental construction, but we may dismiss that contention with the observation that we do not consider the true construction as doubtful, and that the departmental construction referred to was neither *contemporaneous* nor *continuous*."

Wisconsin Central R. Co. vs. U. S., 164 U. S. 190, 205.

It is apparent from the above cited cases that the rule regarding the weight to be attached to administrative interpretations of statutes is not a technical one which must be slavishly or uniformly followed in all cases. The rule arises

out of certain practical considerations of which the courts have availed themselves when called upon to interpret statutes. These considerations have greater or less significance depending upon the circumstances of the individual case.

An analysis of the opinions quoted above reveals a number of significant factors. The rule "does not apply in cases where the construction is not doubtful." (*U. S. vs. Missouri Pacific R. Co.*) It applies with lesser force if the administrative decisions in question "do not embody the results of any specialized departmental knowledge or experience." (*Haggar Co. vs. Helvering.*) It has "peculiar weight when it involves a contemporaneous construction of a statute." (*Norwegian Nitrogen Products Company vs. U. S.*) It is entitled to greater or less respect depending upon whether the administrative interpretation has or has not been "continuous." (*Wisconsin Central R. Co. vs. U. S.*) It is of lesser significance where "no one * * * will be prejudiced" by the rejection of the administrative ruling. (*Haggar Company vs. Helvering.*)

An examination of the language of the Commission's decisions interpreting Section 1(18-20) of the Interstate Commerce Act with relation to its jurisdiction to impose conditions for the protection of employees and an examination of the facts surrounding such decisions will reveal that the Commission's interpretation (a) was erroneous in the first instance; (b) dealt with a subject outside the sphere of the Commission's technical knowledge; (c) was not contemporaneous with the enactment of the statutory provision; (d) has not continued over a substantial period of time; (e) is not such that its rejection at this time will damage anyone.

In the ensuing discussion, we wish to consider the above factors in the order named.

(a) The Commission's Interpretation was Erroneous in the First Instance

This question requires no extended discussion here, as in effect it supplied the subject matter of the entire first section of this brief. We wish to supplement our previous discussion, however, by pointing out more particularly the exact error into which the Commission fell.

Its conclusion that it had no jurisdiction to impose conditions for the protection of employees under Section 1(20) of the Interstate Commerce Act was first announced in the case of *Chicago Great Western Railway Company Trackage*, 207 I. C. C. 315. In its opinion, after referring to an earlier case (*St. Paul Bridge and Terminal Railway Company Control*, 199 I. C. C. 598) wherein it had considered the effect of the applicants' proposal upon employees as being a matter of "public interest," the Commission held as follows:

> "The present proceeding differs from that one in that it is brought under the provisions of Section 1(18-20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in Section 5(4) proceedings we are of the view that under Section 1(20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from Section 5(4) and read into Section 1(20) the power to impose such terms and conditions as we may find to be *just and reasonable*. Our sympathy for employees and full realization of the hardship that may and often does result to them in the administration of the abandonment and other provisions of Section 1(18-20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity." (Pp. 322-3.) (Emphasis supplied.)

At the time when this decision was rendered, the Commission had never imposed upon an order issued under Section 5(4) any really comprehensive conditions for employee protection.* In the tentative steps it had made in that direction, it had found support for its position in the inclusion of the phrase "just and reasonable" in that section of the statute. From the above quoted excerpt, it is obvious that the Commission viewed this language as being of supreme significance in relation to its jurisdiction under Section 5(4), and considered that its omission from Section 1(20) constituted a conclusive obstacle to the exertion of any similar authority under the latter section.

As already pointed out, however, this court did not predicate its decision in *U. S. vs. Lowden* upon any distinctive phraseology in Section 5(4) as constituting evidence of Congressional intent, but rather upon the more basic ground that the public interest contemplated a rea-

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* In the case of *"In the Matter of Consolidations of Railroads,"* 185 I. C. C. 403, 427, the Commission urged upon carriers contemplating consolidations that they give consideration to the question of employees' interests, and stated that the Commission itself would consider the imposition of appropriate conditions even though at the same time it expressed some doubt as to its jurisdiction to do so.

In the case of *"Unification of Lines in Southern New Jersey,"* 193 I. C. C. 183, the Commission declined to impose conditions for the protection of employees on the ground that the facts of the case did not warrant it.

It did impose conditions for employee protection in the case of *"St. Paul Bridge and Terminal Railway Company Control," supra*, but only to the extent that separate seniority rosters be maintained.

In *"Associated Railways Company Acquisition and Securities,"* 228 I. C. C. 277, the Commission rejected the application entirely and stated as one ground among many others that employees would be injuriously affected.

It was not until the case of *"Chicago, Rock Island and Gulf Railway Company Trustees' Lease,"* 230 I. C. C. 181, and 233 I. C. C. 21, that the Commission considered the question at length, definitely held that it had jurisdiction under Section 5(4) to impose conditions for the protection of employees, and actually did impose such conditions comprehensive in scope. This is the case which later came before this court under the title of *U. S. vs. Lowden*. Even in this case, four members of the Commission dissented on this point, and one Commissioner, in a concurring opinion, expressed doubt as to the Commission's jurisdiction.

These are the only cases of which we are aware which considered the question of the Commission's authority to impose conditions for the protection of employees under Section 5(4), prior to the decision of the *United States vs. Lowden*. It will be noted that only the first two of these cases had been decided by the Commission when the case of *Chicago Great Western Trackage* was before that body.

sonable protection of employees who might be injured as a result of the effectuation of the public policy which was expressed in the Act. The decision of the Commission in *Chicago Great Western Railway Company Trackage* was obviously based upon a directly opposite premise and was therefore clearly erroneous. It sought to elevate to a position of false importance a minor difference in phraseology between these two sections. That the difference was in fact minor is apparent. Any authority to impose conditions, or to enter any order, granted to the Interstate Commerce Commission or any other administrative agency is necessarily limited by the requirement that it be exercised in a "just and reasonable" manner. This proviso is present by implication in all portions of the Interstate Commerce Act and other statutes. The fact that it was expressed in terms in Section 5(4) and not in Section 1(20) does not establish any valid difference in meaning between the two sections. The Commission, however, assumed such a distinction and upon it predicated its decision in the *Chicago Great Western* case.

At no time, either before or since the decision in *U. S. vs. Lowden*, has the Commission ever seen fit to reconsider the reasoning upon which it based its original decision. In all subsequent cases, it has contented itself by merely citing the *Chicago Great Western* case. Hence, it may be fairly said that the language of this opinion as above quoted represents the only effort ever made by the Commission to rationalize its position.

We conclude from all of the foregoing that the cases wherein the Commission has construed Section 1(20) in regard to the extent of the jurisdiction conferred are clearly erroneous. An administrative interpretation which is contrary to the express terms of an unambiguous statute is entitled to no weight when the statute comes before the courts for construction.

(b) The Commission's Interpretation Dealt with a Subject Outside the Sphere of Its Technical Knowledge

Administrative boards and commissions are established because the specialized knowledge of their members is considered essential to the proper administration of statutes operating in complicated fields. Where such bodies make interpretations of the provisions of the statutes under which they function in relation to the technical questions which arise, their decisions have been accorded a relatively high degree of respect.

The question here involved has no such technical aspect. The concept "public convenience and necessity" is not one which is peculiar to the Interstate Commerce Act or to the transportation field. It is one which is familiar in all public utility law. The question of the interpretation to be given to that phrase is therefore one of general law. It is not one where a lay board such as the Interstate Commerce Commission has any inherent advantage growing out of the departmental skill or specialized knowledge of its members. The advantage is rather with the courts whose traditional function it is to interpret the general terms of general statutes.

It follows, therefore, that the decision of the Interstate Commerce Commission that employees' interests are unrelated to the public convenience and necessity is a decision on a matter entirely outside the field of the administrative expertness of that body, and is entitled to relatively little weight in the courts.

(c) The Commission's Interpretation Was Not Contemporaneous with the Enactment of the Statutory Provision

Administrative officials are likely to be closely attuned to situations, problems and purposes which bring about the

enactment of statutes within the field of their specialization, even sometimes to the extent that they actually participate in the drafting of proposed legislation. Their interpretations when made in the early stages of the application of the law thus frequently spring from the same forces which prompted its enactment so that legislation and interpretation constitute in fact one continuous process. When administrative constructions are given under such circumstances they shed valuable light on the probable intent of the legislature. Where, however, the interpretation in question is first uttered long after the passage of the statute, this factor is not operative and the administrative ruling is entitled to no peculiar respect in this regard.

As applied to the facts of this case, we find that, as noted above, Section 1(18-20) formed a part of the Transportation Act of 1920. The Commission's interpretation of the language of this section as stated in the case of *Chicago Great Western Trackage*, *supra*, was not made until 1935. The doctrine of that case was not applied to the abandonments of railroads until 1936. Thus, the decisions of the Commission were not made until many years after the statute was enacted, and throw little or no light upon the question of the probable intention of its framers.

(d) The Commission's Interpretation Has Not Continued Over a Substantial Period of Time

Where an administrative ruling interpreting a statute has existed for a comparatively long time without challenge, a natural presumption arises to the effect that it must accord with the meaning of the statute and the understanding of the parties personally interested in its application. This factor, however, like all the others involved in the present phase of the discussion, must be cautiously applied in light of all the facts and surrounding circumstances. In the

present case, the relevant facts surrounding the period during which the Commission's interpretation has prevailed, are, in chronological order, as follows:

1935—Decision of the I. C. C. in the case of *Chicago Great Western Railway Company Trackage*—first announcement of the doctrine that Section 1(20) does not confer jurisdiction to impose conditions for the protection of employees.

1936—Decision of the Commission in *Delaware River Ferry Company of New Jersey Abandonment*, 212 I. C. C. 580—first application to abandonments of the rule stated in *Chicago Great Western* case.

1938—Decision of Division 4 of the Commission in the case of *Chicago, Rock Island and Gulf Railway Company Trustees' Lease*, 230 I. C. C. 181—first case attaching comprehensive conditions to an order issued relative to a consolidation consummated under Section 5(4) of the Interstate Commerce Act.

1939—(April 3) Decision of Division 4 affirmed by the full Commission, *Chicago, Rock Island and Gulf Railway Company Trustees' Lease*, 233 I. C. C. 21.

1939—(July 31) Decree of U. S. Dist. Ct., N. D. Ill., setting aside order of I. C. C. in *Chicago, Rock Island and Gulf* case. *Lowden vs. U. S.*, 29 Fed. Supp. 9.

1939—(Dec. 4) Decision of the Supreme Court in the case of *U. S. vs. Lowden* reversing the decree of the District Court in *Lowden vs. U. S.*, and sustaining the decision of the I. C. C. in the *Chicago, Rock Island and Gulf* case.

1940—(Aug. 28) Decision of the I. C. C. in the present case rendered. *Pacific Electric Railroad Company Abandonment*, 242 I. C. C. 9.

1940—(Nov. 8) This action was filed. (R. 1.)

From the above, it appears that the administrative ruling which is here challenged has prevailed for slightly more than five years. During one-half of that time, another

case was pending before the Commission and the courts involving a similar issue. Had a decision been rendered in that case contrary to that which was eventually reached, it would have effectively foreclosed the appellees from in any way contesting the Commission's interpretation of Section 1(20) as announced in the case of *Chicago Great Western Railroad Company Trackage*, and subsequent cases. Hence, although the appellants are able to cite an impressive number of cases wherein their present position was stated these cases were actually concentrated in a relatively short period of time, during only a small fraction of which was any practical opportunity of protest afforded to the employees. As soon as such opportunity presented itself, protest was made and prosecuted diligently.

Thus, the interpretation reached by the Interstate Commerce Commission is not entitled to any presumption of correctness on account of any claim that it has long continued in effect without objection by the parties.

(e) The Commission's Interpretation Is Not Such That Its Rejection at This Time Will Damage Anyone.

Where a statute imposes upon individuals certain obligations with which they must comply at their peril, and they do comply with those obligations as they are interpreted by administrative authorities, there is, of course, sound reason why the courts should be reluctant to reverse such an interpretation. This, however, is not the situation here.

Section 1(20) imposes no general duties upon all carriers. It becomes operative only after an application for a certificate of public convenience and necessity is filed and establishes the *criteria* by which such an application is to be judged. It is apparent, therefore, that the rejection of the existing interpretation of this section heretofore adopted by the Commission cannot be effective to alter the status of

carriers generally. Certainly those which have filed no application for a certificate cannot be affected by any change in construction.

Furthermore, it is improbable that any carrier who has already filed such an application and whose application has been granted without conditions looking to employee protection will be deprived of any substantial legal right. Certainly no such conditions can be attached to a transaction already consummated without at least a reopening and rehearing of the case before the Commission. At such a hearing, the Commission would undoubtedly have discretionary power to impose or refuse to impose conditions in light of all the facts of the particular case. Surely the judgment of the Commission could be relied upon to prevent any substantial injuries which might arise because of a changed interpretation of the statute.

Furthermore, in this connection, it should be observed that the aim of Section 1(18-20) was, in part at least, to confer upon the railroads a *benefit* through enabling them to divest themselves of the obligation to continue unprofitable operations no longer required by the general public convenience and necessity but which had in many instances been required by the laws of the various states. A discretionary power vested in the Commission, which would enable that body under proper circumstances to require those carriers seeking the benefits of the Act to share a portion of their anticipated gains with the employees injured, cannot be said, therefore, to deprive the railroads of any property right. At most, it would constitute a diminution of the benefit which the statute itself affords. Surely no railroad company can be heard to complain merely because the gains which it derives from an abandonment turn out to be less than it had originally anticipated, particularly if the

diminution of benefits enjoyed was shown to be required by the public convenience and necessity.

Hence, we conclude that there is no one in a position to suffer serious damage by a change in his legal status if the Commission's interpretation of Section 1(20) is now rejected.

Summary

From all of the foregoing, we conclude that the Commission's interpretation of the extent of its authority under Section 1(20) of the Interstate Commerce Act is in no sense binding upon this court, (a) because it is based on an obviously erroneous construction of the statute; (b) because it is not a decision of a technical point in a specialized field where the Commission may be presumed to be peculiarly competent, but is rather a decision of a general issue of law within the province of the courts; (c) because the Commission's interpretation was not contemporaneous with the enactment of the statute, but was issued 15 years thereafter; (d) because this interpretation has not existed for a long period during which opportunity was available for attacking it, and (e) because no one can be now relying upon this section as establishing presently existing rights and no one can be injured if this interpretation is now rejected.

III. THE CONGRESS HAS NEVER RATIFIED THE INTERPRETATION GIVEN BY THE COMMISSION TO SECTION 1(20) OF THE INTERSTATE COMMERCE ACT.

The appellants advance yet another argument in support of their position. Like that discussed in the preceding section, it is derived from the administrative interpretation placed upon Section 1(20) of the Interstate Commerce Act by the Commission, but seeks to attach further significance

to that interpretation because of the fact that Congress has not amended this section since the Commission's ruling was announced.

It is unquestionably true that under proper circumstances, Congressional silence may amount to a ratification of an administrative ruling and the courts have so held. The doctrine at most, however, is one of presumption. If the legislature knows of such a ruling or must be presumed to know of it because of its long continuance and nevertheless fails to alter the statute, then the interpretation in question is assumed to have been in accord with the original legislative intent.

Obviously this doctrine of legislative ratification of an administrative construction of a statute is subject to many of the same limitations as discussed above. Thus, the administrative interpretation must not be obviously erroneous if the doctrine is to apply and it will apply with lesser force if the interpretation is not contemporaneous nor long continued, nor within the technical field with which the administrative tribunal is familiar, nor if its rejection will have no injurious effects upon private interests.

The doctrine is definitely one of limited applicability. In addition to the limitations noted above it is subject to further limitations peculiar to itself. As was well stated by one of the lower federal courts in the case of *F. W. Woolworth Company vs. U. S.*, 91 Fed. 2d 973, 976:

> "But not every ruling is incorporated in the text because it is not repudiated; no one has ever suggested anything of the sort."

and further:

> "To suppose that Congress must particularly correct each mistaken construction under penalty of incorporating it into the fabric of the statute appears to us unwarranted; * * *."

Thus, mere Congressional inaction does not necessarily place the stamp of legislative approval upon all administrative rulings. Something further is needed to establish a tangible basis for a presumption of legislative ratification. The appellants claim to find such additional factors in certain reports which were made to Congress by the Interstate Commerce Commission regarding its jurisdiction to protect employees, upon which Congress took no action, and in the deliberations and legislative proceedings surrounding the enactment of the Transportation Act of 1940.

It is true that in both its 49th and 50th Annual Reports (1935 and 1936) the Interstate Commerce Commission expressed doubts as to the extent of its jurisdiction to protect employees from the injurious consequences of certain transactions which it was authorized to approve or disapprove. It will be noted, however, that these reports related *both to abandonments and to consolidations or unifications of carriers.** They therefore referred as much to Section 5(4) of the Act as to Section 1(20). As to Section 5(4), they related to the jurisdictional doubts which the Commission entertained regarding this section up to the time of the decision in *U. S. vs. Lowden.* Congressional in-

* The text of the 49th Annual Report as to this point reads as follows:

"In proceedings under provisions of the interstate commerce act we issue certificates of public convenience and necessity authorizing railway common carriers *to abandon* existing facilities, *or to unify* their railway properties or operations. It follows as a consequence of such *abandonments or unifications* that sometimes employees are transferred from one location to another and in some cases are dismissed from the service. An instance in which such consequence resulted from the use by one carrier of certain facilities of another, jointly with the latter, is given in our report in *Chicago G. W. R. Co. Trackage*, 207 I. C. C. 315. In individual cases the financial sacrifices involved are calamitous. In some cases the carriers concerned have voluntarily effected arrangements satisfactory to the employees; in others we were able to impose protective provisions in our orders; but in still others we lacked the statutory authority to impose conditions which just treatment of employees appeared to require. This refers particularly to relocation or abandonment of shops. We recommend further statutory provisions to protect employees from undue financial loss as a consequence of authorized railway *abandonments or unifications* found to be in the interest of the general public, or otherwise lawfully effected." (Emphasis supplied.)

action over the next five years as to both subjects mentioned in these reports was therefore as potent an argument to disprove the Commission's jurisdiction to protect employees in relation to consolidations as in relation to abandonments. In fact, these very reports are referred to in support of the dissenting opinion of four commissioners in *Chicago Rock Island and Gulf Railway Company Trustees' Lease*, 233 I. C. C. 21, 28, and in support of the decision of the District Court in *Lowden vs. U. S.*, 29 Fed. Supp. 9, 13. This argument was not considered controlling by this court when the case of *U. S. vs. Lowden* was before it for consideration and no reason is seen why it should be given greater weight here.

During the period 1936 to 1939 while Congress amended various sections of the Interstate Commerce Act, a long and complicated statute, it did not give consideration to the question of the protection of employees adversely affected by either abandonments or consolidations. During the year last mentioned, however, a comprehensive measure was introduced as an amendment to the Interstate Commerce Act which was later enacted in modified form as the Transportation Act of 1940. This Act made further provision for the protection of employees affected by consolidations authorized under Section 5 but made no change in the language of Section 1(20). The appellants argue from this fact that the general question of employee protection was in the mind of Congress, and that that body must also have had in mind protection of employees injuriously affected by abandonments. From this conclusion, it reasons that Congress must have known the nature of the Commission's decisions regarding its jurisdiction under Section 1(20) and must have intended to confirm those decisions. The legislative history of the Act, however, fails to support this conclusion.

We will show below that the purpose of Congress was such that the protection of employees injuriously affected by consolidations of railroads was a necessary and integral part of that purpose, while a similar protection in relation to abandonments was entirely foreign thereto. We will also show that such references to the abandonment question as may be found in the legislative history do not establish that Congress had any knowledge of the controversy which was then in progress in relation to the extent of the Commission's *jurisdiction* under Section 1(20), and that the subsequently enacted legislation has no proper bearing on this controversy.

Transportation Act Developed from Committee of Six Report.

The Transportation Act of 1940 developed from a bill known as S. 2009. This bill was based upon the recommendations of two committees, the Committee of Three, and to a larger extent, the Committee of Six. The facts in this connection are set forth in the following excerpt from the Report of the Committee on Interstate Commerce of the United States Senate as presented by Chairman Wheeler of that Committee:

> "In 1938 President Roosevelt appointed a special committee to study the railroad problem. That committee, composed of Commissioners Splawn, Eastman, and Mahaffie of the Interstate Commerce Commission, and unofficially designated as the Committee of Three, made certain definite recommendations. They urged, among other things, the creation of a transportation board. They likewise recommended the regulation of water carriers by a central regulatory body. This recommendation was one which President Roosevelt, in his message to Congress on June 7, 1935, had made and one which the Federal Coordinator of Transportation, as well as the Interstate Commerce Commission in its annual reports to Congress, had endorsed.

"On September 23, 1938, President Roosevelt appointed another special committee, this one known as the President's Committee of Six, to further study the railroad problem and to make recommendations. On December 23, 1938, this Committee of Six, composed of three representatives of railroad management and three representatives of railroad labor, reported its analysis and its proposed solution for the railroad problem.

"The recommendations of the President's Committee of Three and the recommendations of the President's Committee of Six, and a careful consideration of the public interest constituted the basis upon which the bill, S. 2009, was drafted and introduced." (Report of the Committee on Interstate Commerce of the United States Senate, Report No. 433, 76th Congress, First Session, pp. 1 and 2.)*

Nature of Transportation Problem.

More important than the knowledge of the identity of the various bodies who contributed in their turn to this legislation is an accurate understanding of the nature of the problem which they were endeavoring to solve. This problem is clearly analyzed in the report of the Senate Committee on Interstate Commerce above referred to. We quote from the Report:

"The bill, S. 2009, represents a sound, realistic, and carefully considered approach to the solution of one of the most grave problems which confronts the people and the Congress of the United States. The importance of a sound transportation system is recognized by all. It is likewise apparent to even the unobserving that this Nation cannot enjoy a sound transportation system if its most important carrier faces ruin and chaos. With one-third of the railroad mileage already in bankruptcy or receiver-

* Although the Committee on Interstate and Foreign Commerce of the House of Representatives recommended drastic amendments to S. 2009, the statement of the origin of the legislation in the Committee's report is almost identical with that contained in the Report of the Senate Committee. See Report of Committee on Interstate and Foreign Commerce of the House of Representatives, 76th Congress, First Session, Report No. 1217, pp. 1 and 2.

ship courts and with another third tottering on the verge of bankruptcy, action must be taken to preserve not only the railroads but an adequate transportation system for this country. * * * (P. 1.)

* * * * * *

"For many years it has been the view of keen students of the transportation problem that there has been no consistent national policy with respect thereto. One reason urged in support of that view is that while the principal haulers of traffic and passengers, the railroads, have long been strictly regulated—as have, since 1935, motor trucks and busses engaged in interstate transportation—other forms of transportation are developed at public expense and without supervisory regulation. The net result of such a policy is inequality between various forms of transportation. As has been so often said, in 1887, when the original act to regulate commerce was passed, directed to correct abuses by railroads, the railroads had a monopoly on transportation. In later years competing forms of transportation have developed with such rapidity that no one now urges that there is any such monopoly. The railroads at first refused to treat these competing forms of transportation, particularly by motor, seriously, and it was not until after much of their traffic and many of their passengers had been lured away that the railroads took drastic steps to recover the lost business. The sum and substance of the matter is that at the present time there is a plethora of transportation facilities, and under these circumstances it becomes apparent that some tribunal must be empowered with the authority to determine into what particular niche each form of transportation is best fitted, and to discourage other forms of transportation from entering therein. S. 2009 seeks to do this. It has also been urged, and it seems sound, that there is no equality in treatment when the railroads, and lately the motor vehicles, are strictly regulated, and other forms of transportation are regulated, if at all, to a much lesser extent." (Pp. 2 and 3, Report of the Committee on Interstate Commerce of the U. S. Senate, Report No. 433, 76th Congress, First Session.)

The Committee of Three had considered these problems in a general way and had made some recommendations of a specific nature.* These, however, were not acted on by Congress and it remained for the Committee of Six to sketch the details of the policy which was later adopted in a large measure by the Congress as the Transportation Act of 1940.

The composition of the membership of the Committee of Six is highly significant for the purpose of our present inquiry. As pointed out above, three of its members were selected from the ranks of railroad management and three from those of railroad labor. They were assembled to cooperate in an effort to benefit the industry upon which both wings of the Committee depended for their support. It is of vital importance to note that they were *not there to adjust controversies between themselves.* Their purpose was rather to formulate a plan for the rehabilitation of the railroad industry, a plan from which *all elements involving controversies between labor and management would be eliminated in order that both parties might give it unreserved support.*

Accordingly, no controverted question of labor relations was considered by the Committee. In its report issued December 23, 1938, the Committee stated as follows:

> "Your committee has carefully considered many suggestions and recommendations which have come to us from various sources. We have also considered proposals advocated by railway management and the labor organizations having to do with labor relations, but laid them aside believing that they are in the main problems to be worked out to the extent possible in joint conference by these interests

* The recommendations of the Committee of Three are available in a document entitled "Immediate Relief for Railroads, a Message from the President of the United States Transmitting his Recommendations for Means of Immediate Relief for Railroads," and printed as House Document No. 583, 75th Congress, Third Session.

through collective bargaining, and if no solution can be found they may be urged upon the government or otherwise handled as the circumstances may appear to warrant.'"*

See also in this connection the testimony of Mr. George M. Harrison, at that time President of the Railway Labor Executives' Association, and one of the members of the Committee of Six, as presented before the House Committee:

> "The railroads wanted to talk with us about amending the Railway Labor Act. We wanted to talk with them about a 6-hour day and we realized that if the members of the committee got to discussing, quarreling about those matters we would forget the job we were assigned to do and that job was to do something about the transportation industry." (House Hearings, p. 227.)

As far as the general question of consolidations was concerned, there was at that time no controversy either in or outside the Committee of Six. Under the Transportation Act of 1920, an attempt had been made to direct the consolidation of railroads into a limited number of systems as prearranged by the Interstate Commerce Commission. This plan had proved a failure and it was the consensus of opinion that it should be abandoned. In fact, in the Report of the Committee on Interstate Commerce of the United States Senate above mentioned, it is stated that "the elimination of the requirement for such a (consolidation) plan" is "one of the primary purposes in the bill, so far as consolidations, etc., are concerned." (P. 31.)

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* The report of Committee of Six is reprinted on pp. 257-308 of the House Hearings. The quoted excerpt may be found on p. 277.

In referring to the "House Hearings" and the "Senate Hearings" respectively, may we be understood as having reference to documents entitled "Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 76th Congress, First Session, on H. R. 2531 and H. R. 4862," and "Hearings before the Committee on Interstate Commerce, United States Senate, 76th Congress, First Session, on S. 1310, S. 2016, S. 1869, and S. 2009."

Furthermore, it was apparently conceded on all sides that economies could be brought about through consolidations of rail carriers, and that those economies would be principally realized at the expense of railroad labor. At first glance, this would appear to present one of those controversial questions of labor relations which the Committee of Six desired to avoid. Such, however, was not the case, because the potential conflict of interests between the parties had already been adjusted through the execution of the Washington Job Protection Agreement in May, 1936. This Agreement (reproduced at pp. 231-41, House Hearings) provided in essence for a system of allowances payable over a stated period to employees affected adversely by railroad consolidations.

Accordingly, there was no controversy between the members of the Committee as to the question of the protection of employees in consolidation cases, and the Committee could recommend as it did, that in passing upon a carrier's application for leave to effect a consolidation, the tribunal having jurisdiction "shall examine into the probable results of the proposed consolidation and require, as a prerequisite to its approval, a fair and equitable arrangement to protect the interests of the * * * employees." (P. 275, House Hearings.) It must be remembered that when the Committee made this recommendation, however, it merely advocated the doing of what the employee organizations and 85 per cent of the railroads had already done through the Washington Agreement. That the above is an accurate appraisal of the reasons which actuated the Committee is revealed in the testimony of Mr. Harrison when he stated as follows:

> "Now, the existing situation is this: In 1936 in the spring of that year, we made an agreement with about 85 per cent of the mileage of the country providing a schedule of benefits for workers that might

be affected by coordinations or mergers. That agreement has now been in operation for about 3 years and it has worked out very satisfactorily. It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection.

"Well, you might very properly ask the question, If we have such an agreement why we want to put anything in the law? Well, the reason for it is that about 15 per cent of the mileage of the country refuses to come in to the agreement. You always have the willful minority that will not go along with the general good and so you have got to make those people do what is right, assuming that what has been done is right, and so we propose that this Transportation Board be given the authority to impose and require protection for men who are adversely affected when these changes are made.

"Now, the exact formula of that, of course, I am not here prepared to suggest, but at least we have solved that problem through collective bargaining with management and if we could get all of the roads into the agrement we would not even suggest any protection as a matter of law." (Pp. 216-17, House Hearings.)

Mr. Carl R. Gray, one of the carrier members of the Committee of Six, was evidently of the same opinion, for in his testimony before this same Committee, the following statements were made:

"Mr. Youngdahl: Have you any suggestions as to what might be done for the men under consolidations?

"Mr. Gray: Yes. We have had no difficulties in handling that separability with the men.

"Mr. Youngdahl: You refer to your ability to furnish jobs?

"Mr. Gray: We have a basis of compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination." (House Hearings, pp. 193-4.)

S. 2009, both in the form in which it was adopted by the Senate and in the amended form in which it was favorably reported by the House Committee, directs the Interstate Commerce Commission to require as a prerequisite to its approval of any proposed consolidation action "a fair and equitable arrangement to protect the interests of employees affected." By incorporating this language into the statute, the Congress adopted the attitude of the Committee, *i.e.*, that here was a non-controversial matter germane to the purposes of the statute which should be included without further debate.

From the foregoing discussion, it appears that the question of the protection of employees adversely affected by consolidations was definitely a part of the subject matter of this legislation from its inception. It was one which came within the scope of the deliberations of the Committee of Six and found a place in its report. It was intimately related to the purpose of the legislation because the removal of outworn restrictions on consolidations of rail carriers was in line with the basic legislative purpose of equal regulation for all carriers. Such a removal of restrictions necessarily presented the question of the effects of the anticipated consolidations upon employees. The fact that such a consideration gave rise to a positive enactment on the question is easily understood.

The fact that this court had decided the case of *United States vs. Lowden, supra,* holding that the desired protection was already available at the discretion of the Interstate Commerce Commission, does not militate against this conclusion. The Senate had passed S. 2009 and the House also had passed an amended form thereof at the time when *United States vs. Lowden* was decided, although the final form which the bill would take was dependent upon the agreement of the Houses through conference committee.

This court had this to say regarding the significance of the provisions in these bills:

> "We think the only effect of this action was to give legislative emphasis to a policy and a practice already recognized by Section 5(4) (b) by making the practice *mandatory instead of discretionary*, as it had been under the earlier act." (Emphasis supplied.) (P. 239.)

Thus, in the opinion of this court, the Congress by passing the Transportation Act merely cemented a policy already recognized as affording a basis for the exercise of the discretion of the Interstate Commerce Commission. This action was taken by it "in its stride" in the course of the enactment of a far-reaching piece of transportation legislation dealing with many other problems.

Reasons for Congressional Action In Consolidation Cases Did Not Apply In Relation to Abandonments.

The question of abandonment and the protection of employees therein has no such complete legislative history. Apparently it has been felt by many that a facilitation of consolidations by rail carriers is a policy likely to strengthen the industry. No corresponding idea appears to have been expressed in connection with abandonments. The general question was not considered by either the Committee of Three or the Committee of Six. As far as the protection of employees affected by abandonments is concerned, the Committee of Six had no suggestion to make. The reason is not hard to find. The Washington Job Protection Agreement does not cover cases of abandonment. The question of employee protection in the event of abandonment was, in 1938, and still is a bitterly contested one between railroad management and railroad labor. It was one of those questions of "labor relations" which, as stated by the Commit-

tee of Six in its report, found no place in its recommendations. Thus, when these recommendations were presented to Congress, the abandonment issue was not raised or called to the attention of that body.

In support of this position, we refer the court to the testimony of Mr. Harrison before the House Committee where, on page 244 of the report of its hearings, he stated as follows:

"Now, there is one matter I want to call your attention to, which is important.

"Just how we will take care of it I don't know, but at least I want to have it before you.

"The Chairman: Is that on the same question?

"Mr. Harrison: It is on the same question. The agreement does not cover instances where parts of railroads are abandoned.

"We sought to get the protection extended in those cases, but the carriers declined to agree with the organizations to afford protection in instances of abandonments.

"Now, if the Government should intervene through its powers and undertake to bring about abandonments, of course, that is a new situation for us and we think it would be fair if governmental assistance was brought into the abandonments of properties, that the Government should then provide for protection in those instances.

"Now, I realize I am skating on thin ice and I do not want to be in any position of bad faith with our employers, because we have this agreement and if it is not satisfactory the burden is on us to change it. I would like to have an opportunity to talk that matter out with our employers before I should make any definite request upon the committee in that direction. I think we owe that to them to talk to them about it." (House Hearings, p. 244.)

Mr. Harrison stated clearly therefore that the protection of employees in abandonment cases was not a matter upon which the Committee of Six had made any recom-

mendation for the reason that the two groups represented on the Committee were not in agreement on the point. He recognized that the question of the facilitation of abandonments was one which was as yet outside the scope of federal policy, but said that "if the Government should intervene through its powers and undertake to *bring about abandonments*, of course that is a *new situation* for us, and we think it would be fair, *if governmental assistance was brought into the abandonments of properties*, that the government should *then* provide for protection in those instances."*

By way of summary of our discussion to this point, we have seen that the governmental policy ultimately expressed in the Transportation Act of 1940 was one of removing restrictive regulations imposed upon the railroads when they enjoyed a transportation monopoly, but no longer desirable or fair in a day of keen competition between them and other transportation agencies not so regulated. As a natural expression of this policy, governmental restrictions on the consolidations of rail carriers were relaxed. As a natural result of this step, Congress legislated to protect employees affected by such consolidations and adopted a standard of protection agreed to generally by the bulk of the carriers and the employees in the railroad industry.

Abandonments, however, were entirely aside from that governmental policy which was made operative by the Act. No one suggested any substantial change in the abandonment provisions as a means of equalizing regulation among types of carriers and no such change was made. Accordingly, the logic of events did not present to the Congress any question of the effect of abandonments upon employees. The Committee of Six did not bring the matter before the legislators because the Committee itself was not in agree-

* Emphasis in this quotation has been supplied. We have also taken some liberties with the punctuation for the reason that the official record obviously does not bring out the sense of the witness' testimony.

ment, and the point was considered by it to be outside the scope of its activities. The question of abandonments was entirely foreign to the main current of congressional deliberation set in motion by the sponsors of this legislation, and there was nothing connected with this current which would serve to draw congressional attention to a consideration of the effect of such abandonments upon employes or to the adequacy of existing law.

It remains to be seen, however, whether the question of employee protection in abandonments was introduced into the legislative current from other sources in such manner as to focus congressional attention upon it. Without proof that such attention was bestowed, no presumption can be raised from congressional silence.

We wish to consider in this connection the testimony of one witness at the Senate Hearings and the significance of two amendments and a bill presented in the House of Representatives.

The McGrath Testimony

The record of the hearings conducted by the Committees of the House and Senate consists of over 2500 printed pages. The only substantial reference to the question of railroad abandonments which either we or opposing counsel have been able to find (with the exception of Mr. Harrison's statement above noted) is contained in the testimony of Mr. Tom J. McGrath, who appeared as the representative of the Brotherhood of Railroad Trainmen. Mr. McGrath's references to this question are limited to three pages in the Senate Hearings, pages 402-4, inc.

The Interstate Commerce Commission in its brief has indulged in an extended analysis of this testimony in an effort to establish that Mr. McGrath and Chairman Wheeler of the Committee discussed the question of the desirability of vesting in the Commission a *discretionary* power to pro-

tect employees adversely affected by railroad abandonments, a power similar to that whose existence is here asserted by the appellants. Selected passages from this testimony have been quoted in support of this conclusion. A critical analysis of the record, however, fails to sustain the position taken by the Commission in its brief.

The original bill S. 2009 which was being considered by the Committee, contained the following provisions:

> "In passing upon any proposed transaction under the provisions of this section, the Commission shall give weight to the following considerations, among others, * * *
>
> "(4) the interest of the carrier employees affected"—
>
> "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected."

Mr. McGrath's objection to this language was stated by him as follows:

> "If there is going to be a provision in the law which makes it mandatory upon the Commission to consider the interests of the employees, there should be something more concrete than that and something of a different nature." (Senate Hearings, p. 400.)

In reply to a comment to the effect that Congress should not be expected to particularize as to such a matter in the course of legislation, Mr. McGrath reminded the Committee that a provision had been written into the Emergency Transportation Act of 1933 to the effect that "men should not be discharged as a result of coordinations, but that they should be absorbed, and that natural attrition and normal attrition should take care of the reduction of the force;" (p. 400) and stated a little later that "the provisions of the 1933 act are better and more equitable and

surer" than those contained in the suggested bill (p. 401); and that "you asked me what I would suggest as being preferable to this; and I have given that to you." (p. 401) On p. 402, of this record, Mr. McGrath is further reported as saying that if men are entitled to protection against loss of jobs in cases of consolidations and mergers, as he was contending, "the same thing is true with respect to abandonments." (Appendix A, p. 1.)

Thereafter, there ensued the discussion upon which the appellant Interstate Commerce Commission relies so heavily. Believing that the court will more readily appreciate the issues involved from a reading of the entire discussion rather than from scattered quotations, we have reproduced it in its entirety as Appendix A of this brief.

An examination of this material will reveal that throughout, the witness was contending for the inclusion in the act of mandatory language providing that in no case of consolidation or abandonment should any employee be displaced but that all should be absorbed by the carrier or carriers involved pending reduction of working forces through natural and normal attrition. The Chairman, on the other hand, contended that such a limitation was wholly impracticable, particularly in connection with abandonments.

It is true that, in the course of the discussion, the witness (not Chairman Wheeler) referred in passing to a "discretionary power in the Commission." (See p. 403 of the Senate Hearings (Appendix A, p. 6) and *cf.* p. 20 of the brief of the I. C. C.) It is not clear whether the reference was to the power of the Commission generally in consolidation or abandonment cases, or to a more specialized power to protect employees in such cases. The full quotation reads as follows:

"I am asking—if you put discretionary power in the Commission—that you make it broad enough to take care of these conditions, which we think merit consideration by the Commission. You are not imposing any *obligation* on them." (Emphasis supplied.) (Appendix A, p. 6.)

The whole purport of this statement is clear. While the witness used the word "discretionary," his objection to the bill was stated to be that it imposed no "obligation" upon the Commission. Hence, it is clear that his proposal did not contemplate any truly discretionary power.

This proposal of Mr. McGrath was attacked by the Committee not because of the inclusion of abandonments therein, but because of its mandatory requirement that no employee should be displaced—a requirement which they appeared to consider unworkable as to either abandonments or consolidations. It is true that certain remarks were made directed primarily to the abandonment question but it is perfectly clear that it was the scope of the protection proposed to which the Committee objected and not the nature of the transaction to which its application was suggested. Thus, the general question of employee protection in abandonment cases was not raised in this discussion, either expressly or by necessary implication.

The Original Harrington Amendment

S. 2009 was passed by the House of Representatives only after drastic amendments had been made. The amended section dealing with the protection of employees, reads as follows:

"(e) No consolidation, merger, purchase, lease, operating contract, or acquisition of control, which contemplates a guaranty of dividends shall be approved by the Commission except upon a specific finding by the Commission that such guaranty is not inconsistent with the public interest. No consolidation or merger shall be approved which will result

in an increase of total fixed charges on funded debt, except upon a specific finding by the Commission that such an increase in a particular case would not be contrary to public interest. The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected: *Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*"

The italicized portion of the above quotation is the so-called Harrington Amendment which was offered from the floor by Congressman Harrington and adopted by the House of Representatives.

It will be noted that this was the first departure from the original recommendation of the Committee of Six as to the measure of protection to be accorded to employees. The Amendment sought to permanently prohibit the displacement of employees as a result of consolidations. Had the Amendment been adopted as a part of the finally enacted statute, consolidations could have been effected thereunder, but it would have been necessary to keep all employees of the consolidating carriers on the payroll until such time as the normal attrition of the force reduced the number to the level needed for a permanent working force. This is substantially the same suggestion as that made by the witness McGrath and noted above. Regardless of the merits or demerits of this proposal, it is clear that it encountered widespread opposition. The Interstate Commerce Commission sent a special communication to Congress condemning the principle of the Harrington Amendment in the following language:

"The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

Certainly this Amendment affords no basis for a contention that the abandonment question was raised in Congress during these legislative developments, for it contains no mention of abandonments. The Amendment is significant, however, for our purpose in that it shows again that the controversy regarding employee protection centered about the measure of that protection rather than the field in which it was to be operative.

Harrington Bill. S. 2009 went to conference committee on July 29, 1939, and was reported out on April 26, 1940, with the Harrington Amendment completely eliminated. On the same day, Mr. Harrington introduced in the House a bill known as H. R. 9563, reading as follows:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That hereafter the Interstate Commerce Commission, in approving or authorizing any pooling contract, agreement, or combination, any division of traffic or earnings, or any consolidation, merger, purchase, lease, operating contract, or acquisition of control, described in section 5 of the Interstate Commerce Act, or in issuing any certificate permitting *abandonments* under paragraphs 18, 19, and 20 of section 1 of said Act, shall include in its order of approval or authorization, or certificate, as the case may be, terms and conditions requiring that such transaction not result in unemployment or displacement of employees of the railroad or railroads in-

[redacted]olved in such transaction, or in the impairment of existing employment rights of said employees." (Emphasis supplied.)

This is the first instance when the word "abandonment" was inserted into any of the legislative efforts to protect employees, and it will be noted that the bill contains the same mandatory provisions with respect to displacement of employees as those subsequently rejected by Congress in the amendment to the consolidation section of the Act. It is the first official record of its use by anyone connected with this whole situation since the exchange of remarks between Mr. McGrath and Mr. Wheeler during the Senate hearings over a year before.

As far as we have been able to learn, H. R. 9563 died a peaceful death in the House of Representatives without any action taken thereon by that body.

Modified Harrington Amendment.

The House of Representatives, however, refused to accept S. 2009 as reported out of conference committee with the Harrington Amendment eliminated as above noted, and on May 9, 1940, voted to recommit the bill. At this time, the House proposed protection for employees on lines differing somewhat from those set out in the original Harrington Amendment. Its suggestion was that the Interstate Commerce Commission include in any order authorizing the consummation of certain transactions:

> "terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment."

Among the "transactions" listed as subject to this provision was "the substitution and use of another means of transportation for rail transportation proposed to be aban-

doned." This proposal is noteworthy for two reasons from our point of view: First, it was not to be applicable to *abandonments as such*, nor would it be effective in abandonment proceedings brought under Section 1 (18-20) of the Interstate Commerce Act. Its coverage was limited to cases where railroad companies might seek permission to institute a new transportation service in substitution for abandoned rail service. Second, it contemplated the absolute maintenance of employment at the same level as before the "transaction" in question until normal attrition should reduce the force. This last was the same proposal as to the measure of employee protection as that to which the Senate Committee, the conference committee and the Interstate Commerce Commission had already objected.

The conference committee did not adopt the House suggestion, nor did it entirely eliminate the Harrington Amendment from the measure but reported a compromise arrangement which was approved by House and Senate and forms a part of the present Act. The provision as actually adopted reads as follows:

> "(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order." (Transportation Act of 1940, Sec. 7(2) (f).)

The transactions referred to did not include abandonments, but did include consolidations, combinations, etc.*

As already noted, the appellants have taken the position that the abandonment question was before Congress, that Congress took no action to amend the existing law in that regard, and that therefore it is to be presumed that Congress approved the interpretation theretofore placed on the abandonment provisions by the Commission, *i. e.*, that the Commission has no authority to protect employees in such cases. We have analyzed the various legislative developments prior to the amendment, and have found that neither the general question of abandonments, the more specific question of protection of employees in abandonments, nor the technical question of the authority of the Commission to require such protection, was placed before Congress in any emphatic way.

What significance in this connection have the developments centering around the Harrington Amendment? In the first place, it is to be noted that the original Harrington Amendment contained no reference to abandonments and therefore it does not support the defendant's contention. In the second place, as already developed, the second form of the Harrington Amendment was not designed to be effec-

* The coverage of para. (2) is set up in para. (a) (i) and (ii) which read as follows:

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto."

tive in connection with applications for abandonments but in connection with applications of railroad companies for authority to inaugurate substituted service in place of the abandoned rail service. This is an important distinction, for the Amendment, as proposed, would in no sense have been an amendment of Section 1 (18-20) of the Interstate Commerce Act and would not have been controlling upon the Commission's authority thereunder. Hence, the introduction of this Amendment did not raise for congressional deliberation the question of abandonments generally or that of the Commission's authority to protect employees.

The Harrington Bill (pp. 22-23 above) does contain, of course, a clear-cut statement of policy with relation to abandonments, which if it had been adopted, would have accomplished a real modification in the Commission's powers under Section 1 (18-20). We submit, however, that this bill cannot be relied upon as a measure which actually laid this matter before Congress. On the day when it was introduced, a conference committee had reported S. 2009 back to the Houses of Congress with the original Harrington Amendment eliminated. It was obviously a matter of good legislative tactics to then introduce a separate bill incorporating all of the features of the eliminated amendment and more. It will be noted that the House of Representatives refused to take the bill seriously. It took no action upon it and when it voted to recommit S. 2009, its suggestion as to employees' protection followed entirely different lines and contained no mention of abandonments.

It would certainly be an unusual situation if the mere introduction of a bill upon which no action was taken either favorable or unfavorable could be held to constitute a ratification by Congress of all administrative rulings in the construction of existing laws which were contrary to the tenor of the bill.

Accordingly, we conclude that no phase of the controversy over the Harrington Amendment was sufficient to actually place the Congress upon notice of the existence of any question as to the extent of the Commission's authority to protect employees under Section 1 (18-20).

The appellant, Interstate Commerce Commission, has also discussed the above developments in its brief and has supplemented them by extensive quotations from members of the Senate and House of Representatives made during the course of debates. We have examined these quotations with interest and have found nothing except that which is merely supplemental of matters already discussed.

It appears throughout that the controversy over employee protection centered about the extent of that protection and the manner in which it was to be imposed. All proposals agreed that henceforth it should be mandatory upon the Commission to consider employees' interests in consolidation cases. A divergence of views developed, however, on the question of whether the measure of protection was to be left to the Commission's judgment of what was fair and equitable under the circumstances, or whether, on the other hand, the statute should require that no employee was to be deprived of employment as a result of such a consolidation. As a mere incident to this important major issue, the abandoment question made three fleeting appearances on the stage: once in the McGrath testimony, once in the Harrington bill, and once in the revised Harrington amendment, where it was limited, however, to situations in which authority was sought to institute substituted service in lieu of rail service to be abandoned. When all of these instances and all comments concerning them are assembled between the covers of one brief, they may be made to assume an impressive appearance, but when viewed accurately as isolated fragments of a year and a half of legis-

lative history or as paragraphs in a record covering thousands of pages, they are insignificant. During the course of these proceedings, no separate and independent proposal was ever made as to the protection of employees adversely affected by rail abandonments. Always the proposition was that the measure of protection in consolidation cases was to be thus and so, and, as an incidental feature, it was occasionally proposed that the same measure should be extended to abandonments. Always the opposition which developed to such proposals was directed to their mandatory features wherein they required the Commission to provide in its orders that no employee should lose his employment as a result of the transaction to which the Commission gave its approval. This objection was somewhat more vigorously stated in relation to abandonments because some abandonments amount to a complete dissolution of the carrier and the proposed standard was thought by some to be impossible. Never was a proposal made that discretionary power should be vested in the Commission in relation to abandonments nor was this question made the subject of debate. That issue was never raised during the course of the legislative proceedings.

In regard to the whole legislative attitude during the period of the years 1935 to 1940, therefore, it appears that Congress knew from the reports of the Commission made to it in 1935 and 1936 that the Commission entertained doubts as to its jurisdiction to protect employees in relation to certain transactions where its consideration was limited to factors of "public interest" and "public convenience and necessity" respectively. The appellants also presume knowledge on the part of Congress of the course of the Commission's opinions with reference to Section 1(20) and its administrative construction of that portion of the statute.

If such a presumption can be fairly made, it is equally fair to presume that Congress was aware of the decisions rendered by the Commission under Section 5(4) of the Interstate Commerce Act and of the nature of those decisions. Such a presumption necessarily includes a further presumption of Congressional knowledge of the fact that the Commission had proceeded to extend protection to employees under this section with considerable hesitation and contrary to the judgment of a substantial number of its own members, and that it had predicated its decisions to a large extent on the ground of an assumed increase of its powers because of the presence of the phrase "just and reasonable" in Section 5(4) rather than upon the ground that employee protection might be considered as a phase of the public interest.

If the Congress is to be presumed to be aware of administrative opinions, it must surely be presumed to know of the decisions of this court including that rendered by it in the *Lowden* case. It will be recalled that the Commission in its Annual Reports for 1935 and 1936 had expressed a *joint doubt* of its authority to properly protect employees in the course of its consideration of issues of either "public interest" or "public convenience and necessity." It is not unreasonable to suppose, therefore, that Congress may have considered the *Lowden* case, as a *joint disposition* of the doubts which the Commission had jointly expressed in its Annual reports and which had constantly plagued it in the course of its decisions under both sections. Under such circumstances, the Congress could logically have made mandatory the protection theretofore available to employees subject to the Commission's discretion under Section 5(4), and still have left Section 1(20) unchanged in the belief that a discretionary protection was already afforded by that section under the doctrine of the *Lowden* case, which protec-

tion it did not desire to make mandatory because of the varying fact situations presented by various types of abandonment cases.

If any presumption at all can be drawn from the fragmentary evidence of Congressional intent available from the record of the proceedings of that body, certainly the one developed above is at least as logical as that advanced by the appellants.

We know of no better summary as to this whole section of the brief than that supplied by the opinion of the court below. The fact that the court carefully considered this question is demonstrated by its request that supplemental briefs be filed by the parties on this issue. After exhaustive briefs had been prepared and supplied, and the court had given its consideration to the question, it stated its conclusion thus:

> "It appears that a few comments were made in debate, and some discussion, none too clear, was had in the committee hearings, upon the protection of employees in abandonment cases. Later a bill was introduced to require the Commission in abandonment cases to impose conditions prohibiting the displacement of employees. This bill apparently never came to a vote. These discussions resulted only in the enactment of a provision *requiring* a 'fair and equitable arrangement' to protect employees in consolidation cases and other more specific provisions therefor. All the proposals leading to this result similarly dealt with mandatory provisions. We think this legislative history, therefore, can throw little light on the extent of the discretionary authority since 1920 to impose conditions under Section 1(20). Indeed, we think the interpretation so clear that resort to such extraneous matters is unnecessary." (38 F. Supp. 818, 823.) (R. 65.)

CONCLUSION

In conclusion we submit to the court:

First, that no reasonable distinction can be drawn between the language of Section 1(18-20) of the Interstate Commerce Act and that of Section 5(4) as the latter section read prior to its recent amendment, or between the powers conferred by the two sections upon the Commission. The phrases "public interest" and "public convenience and necessity" are indistinguishable in meaning. Both contemplate that the Commission in making its administrative decisions shall be guided by considerations of public welfare. The Commission, therefore, has as complete authority to protect employee interests under the one section of the statute as it has had under the other.

Second, that the administrative decisions of the Commission construing the extent of its jurisdiction under Section 1(18-20) have been so clearly erroneous, so far from contemporaneous, of such short duration, and are so far removed from the technical field wherein the Commission may be presumed to move with peculiar ability that they are of little weight. Furthermore, the reversal of these decisions at this time will be injurious to no one.

Third, that the legislative history of the Transportation Act of 1940 is one of a conflict over issues essentially far removed from those involved in this case, and that occasional fragmentary references to the problem of abandonments are not conclusive as to the existence of legislative intent to deprive employees of protection in abandonment cases or of a passive acceptance or ratification of the administrative decisions rendered by the Commission.

In light of the foregoing, therefore, we respectfully

submit that the decision of the United States District Court for the District of Columbia should be affirmed.

Respectfully submitted,

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APPENDIX A

Testimony of Mr. McGrath. Senate Hearings, Pages 402-404, Inclusive

The Chairman:

But we are not amending the law.

Mr. McGrath:

You are not amending the particular section. I say this particular section 49 should carry with it, as a corollary, an agreement of provision protecting the men against loss of jobs in cases of consolidations and mergers. If they are entitled to that in one case, I think they are entitled to it in another; and the same thing is true with respect to abandonments.

The Chairman:

This provision with reference to pooling has been on the statute books for how long a period? Can you tell me that, Mr. Fort?

Mr. Fort:

Since the first, I think, Senator.

The Chairman:

Since when?

Mr. Fort:

Since 1887 or 1889, I think.

Senator Reed:

Certainly since 1920.

Mr. Fort:

Oh, long before that.

Mr. McGrath:

That does not make a case.

The Chairman:

Except it is the first time that your organization or anybody else has ever intimated that there should be written into the law any provision such as you are suggesting at the present time.

Mr. McGrath:

Well, Senator, the evolution of the treatment of railroad employees of course has been going on, legislatively, for 50 years. During that course of time there have been mergers and consolidations; and we had no way of protecting ourselves until we got this agreement; until this agreement was obtained, we

had nothing in concrete form. Before that time, why, we were able to get some concessions through collective bargaining, at times; but now Congress is going to write a new policy with respect to the treatment of labor.

The Chairman:

Oh, no; we are not. We are not changing in the slightest degree the policy with respect to labor or with respect to pooling.

Mr. McGrath:

I am not talking about pooling, particularly.

The Chairman:

And we are not changing the policy with respect to anything else. All we are trying to do is to put it that in the event that there is a consolidation, then labor must be taken care of.

Now, so far as your statement that we are changing the policy: We are changing it in favor of labor and to help labor.

Mr. McGrath:

Well, Mr. Chairman, your very statement coincides with mine, although we may not have stated it in the same way. Up to the present time, there is nothing in the law that requires the Commission to consider the interests of labor at all. Now you are going to put that in. I say that, to that extent, you are changing the legislative policy. When you say that the Commission must of necessity consider the interests of labor, then all I am saying is that if they must consider the interests of labor in consolidations and mergers, they should also consider the interests of labor where there is pooling of traffic. That is the only point. Also I say that if they are going to consider it in that connection, they should consider it where there is an abandonment of facilities.

The Chairman:

But, Mr. McGrath, just stop and ask yourself this question: When a railroad company says to us, "Here is a piece of track, out here, that is not making any money and there is no traffic on it, and we want to abandon it, because there is no freight to be hauled over it," then what are we going to say to

them? Are we going to say, "You have to employ these men, whether there is any traffic there or not?"

As a matter of fact, suppose the Baltimore & Ohio Railroad line between here and New York could not get any traffic and could not employ any men: Would you say that we should write into the law a provision which would result in our saying to the Baltimore & Ohio Railroad, under those conditions, "You have to employ as many men, whether you have any traffic or not; and if you have no traffic, you must abandon it"? How can you do that?

Mr. McGrath:

I am not saying you should go that far, Senator.

The Chairman:

Well, take as an illustration the branch line running from Billings, Montana, up to Red Lodge: There used to be a lot of traffic over that branch; there was coal being shipped, and there was a great deal of traffic. Then the Northern Pacific began to get its coal at another place. Thereafter, there was no traffic on the Billings-Red Lodge branch; it was more or less idle; and finally they abandoned it and put on some buses; there was not money enough, if they are going to keep that up, when there is no traffic over it, it seems to me they are going to break down their whole labor structure—much more than by laying off a few men. Because if they do not, the whole financial structure of the railroads is going to break down; and if that does happen and the railroads cannot make any money at all, then what is going to happen to labor?

In other words, you cannot put impossible burdens on railroads and still have them pay wages to labor; that cannot be done.

Mr. McGrath:

I understand that. However, I say that if the Commission has the power to put on those restrictions with respect to the men, in occasions of consolidation and merger, that would take care of it. I say that if, under this bill, you are going to give them such power, then let them have it with respect to the abandonments as well as mergers.

The Chairman:

What could they require in cases of abandonment?

Mr. McGrath:

I do not know. They might require the employment of men on other positions with the railroad.

The Chairman:

If the railroad has other positions for them, of course, the railroad is not going to throw them out; but you cannot ask the railroads to make positions when there is not any business.

Senator Reed:

Mr. McGrath, you know very well, do you not, that any trainman or engineman employed on a branch line that happens to be abandoned, retains his seniority on the division to which that abandoned line belongs, and takes rank in employment and continues in employment in accordance with his seniority?

Mr. McGrath:

If he has seniority on the main line. But he may have seniority only on the branch line. We have many of those cases, and I can cite some tragic ones to you, where branch lines have been abandoned.

The Chairman:

Then perhaps you are going to say, "We have some section men working up here on the line. We have no place for them, but we must make a place for them and keep them working."

You cannot do that.

Mr. McGrath:

I am not asking that. I am asking—if you put discretionary power in the Commission—that you make it broad enough to take care of these conditions, which we think merit consideration by the Commission. You are not imposing any obligation on them.

The Chairman:

Mr. McGrath, let me say to you that this committee has always gone just as far and a lot further than a great many people in this country think it should go; but, in the interests of labor, itself, we cannot go so far as to say to them, "If you are going to abandon a line of railroad, the Interstate Commerce Commission has got to keep these men working."

Mr. McGrath:

I do not ask you to say that; but I am not going to quibble with you over that question.

The Chairman:

Candidly, I think what you are suggesting with reference to that is not in the interests of labor. I think it would be very injurious to labor in the long run.

Mr. McGrath:

That is, you mean if we were to insist that these men should be retained?

The Chairman:

If you write in the same provisions, and you have the Washington Agreement, that is what it would mean with reference to abandonments.

Mr. McGrath:

No; the Washington Agreement does not cover abandonments.

The Chairman:

No; but I say if you would have the similar provisions in the law, and then have this Washington Agreement, then you would say to the railroads, "You ought to keep these people, regardless of whether you have any work for them."

Mr. McGrath:

Oh, no, Mr. Chairman. You may not understand the Washington Agreement. The Washington Agreement means that the men laid off shall be paid a certain proportion of their wages, for a length of time dependent upon the length of time they have been in the service.

The Chairman:

When you drew up the Washington Agreement, why did you not provide in there the provisions for abandoments and other things that you are asking the committee to do?

Mr. McGrath:

Now, Mr. Chairman, what about this proposition? Suppose a merger has taken place; there is no disclosure of proposed abandonment of facilities in that instance. It may be a freight house or a yard or something of that sort. As soon as it is approved and perfected and the abandonment is made, the men

get no consideration, under this law. I believe that is something to consider.

The Chairman:

I do not agree with you. When there is a consolidation, I think they take into consideration exactly what is going to take place and how many men they are going to lay off, and then they come under the Washington Agreement.

Mr. McGrath:

The Commission has lost its jurisdiction over it when it has approved a merger or consolidation.

Now, in the case of the changing of facilities or the abandonment of a freight house, we shall say, they do not have to go to the Commission to get permission for that.

The Chairman:

I appreciate that.

Mr. McGrath:

But they may have intended to do that all the time; and the men lose out.

So much for that.

SUPREME COURT OF THE UNITED STATES.

No. 223.—October Term, 1941.

Interstate Commerce Commission, and the Pacific Electric Railway Company, Appellants, *vs.* Railway Labor Executives Association and Brotherhood of Railroad Trainmen.	On Appeal from the District Court of the United States for the District of Columbia.

[March 2, 1942.]

Mr. Justice Black delivered the opinion of the Court.

The appellant, Pacific Electric Railway Company, owns and operates electric railroads and motor bus and truck lines in California. It is a wholly owned subsidiary of the Southern Pacific Railroad Company with whose lines it makes connections at numerous points. It applied to the Interstate Commerce Commission for permission to carry out "a general program of rearrangement of . . . passenger service, involving abandonment of certain rail lines and substitution of motor coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public." The Railway Labor Executives' Association and The Brotherhood of Railroad Trainmen appeared before the Commission as representatives of Pacific's employees. They contended that if the Commission were to grant Pacific's application, it should do so only upon conditions designed to protect employees, and proposed that Pacific be required to provide certain specified benefits for employees who would be displaced or otherwise prejudiced by the abandonment. In support of this contention, they argued that many of Pacific's employees had devoted a large part of their lives to the service of the railroad and had acquired valuable rights of seniority in connection with their employment; that the proposed change would cause many of them to lose their jobs as a result of which they would suffer great hardships and some would be-

come public charges; and that although the abandonment and rearrangement would give Pacific a net annual savings of approximately $378,000, about $302,000 of the saving would be due to a net wage loss suffered by employees. After a hearing, Division 4 of the Commission issued an order permitting abandonment upon the ground that continued operation of the line by Pacific "would impose an undue burden upon the applicant and upon interstate commerce," but held that the Commission was without statutory authority to impose any conditions whatever for the protection of employees in these proceedings. 242 I. C. C. 9. The full Commission denied the brotherhood's request for rehearing. Upon application of the brotherhoods, the Federal District Court of the District of Columbia, composed of three judges, in accordance with 28 U. S. C. § 47, held that the Commission did have authority to impose conditions for the protection of displaced employees. Accordingly, it set aside "That part of the Commission's report which denies consideration of the employees' petition for lack of power . . . with directions to the Commission to consider the petition and take such action thereon as in the discretion of the Commission is proper." 38 F. Supp. 818, 824. Whether it is within the Commission's power in abandonment proceedings to impose conditions for the protection of employees is the single question presented by this appeal.

Section 1(18) of the Interstate Commerce Act provides that "no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment." And Section 1(20) empowers the Commission to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." 49 U. S. C. § 1(18)-(20).

With respect to consolidations, another section of the Act, 5(4), is controlling. In *United States* v. *Lowden*, 308 U. S. 255, this Court held that the Commission has authority under Section 5(4) to impose conditions similar to those sought here in order to protect employees adversely affected by a consolidation. At the time of the *Lowden* case, Section 5(4) provided: "If the Commission finds that subject to such terms and conditions and such modification

as it shall find to be just and reasonable, the proposed consolidation . . . will promote the public interest, it may enter an order approving and authorizing such consolidation . . . upon the terms and conditions, and with the modifications so found to be just and reasonable." 49 U. S. C. § 5(4).

The Commission argues that the conditions it is authorized to impose under the consolidation section—"just and reasonable" conditions, which "will promote the public interest"—are of much broader scope than the conditions it is authorized to impose under the abandonment section—conditions which "the public convenience and necessity may require." Although admitting that provisions for the protection of displaced employees may be a condition that "will promote the public interest", the Commission concludes that such provisions cannot be required by "the public convenience and necessity." We need not decide in what respects, if any, the authorization to impose conditions in consolidations is broader than the authorization to impose conditions in abondonments. For even assuming that the language of the abondonment section is narrower, we cannot agree that it excludes all power to impose conditions of the kind sought here.

The phrase "public convenience and necessity" no less than the phrase "public interest" must be given a scope consistent with the broad purpose of the Transportation Act of 1920: to provide the public with an efficient and nationally integrated railroad system. *New England Divisions Case*, 261 U. S. 184, 189-191. Clear recognition that "public convenience and necessity" includes the consideration of effects on the national transportation system of a proposed abandonment appears in the decision of this Court in *Colorado* v. *United States*, 271 U. S. 153. There, Mr. Justice Brandeis, although stating that "public convenience and necessity" was the sole criterion for determining whether or not an abandonment should be allowed, nevertheless considered the effect of the proposed abandonment in a much broader sphere than the immediate locality and population served by the trackage to be abandoned. See also *Transit Commission* v. *United States*, 284 U. S. 360. And if national interests are to be considered in connection with an abandonment, there is nothing in the Act to indicate that the national interest in purely financial stability is to be determinative while the national interest in the stability of the labor supply available to the railroads is to be disregarded.

On the contrary, the *Lowden* case recognizes that the unstabilizing effects of displacing labor without protection might be prejudicial to the orderly and efficient operation of the national railroad system. Such possible unstabilizing effects on the national railroad system are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case. Hence, it is only by excluding considerations of national policy with respect to the transportation system from the scope of "public convenience and necessity", an exclusion inconsistent with the Act as this Court has interpreted it, that the distinction made by the Commission can be maintained.

It was not until 1935, fifteen years after the passage of Section 1(20), that the Commission first decided that it was without power to impose conditions for the protection of workers in an abandonment. Chicago G. W. R. Co. Trackage, 207 I. C. C. 315, 322. At that time the Commission took the position that requiring displacement allowances as a condition would be the equivalent of granting a private benefit to a particular group of workers, and therefore beyond the scope of authority granted by Congress. The Commission has taken the same position here. It must not be forgotten, however, that the immediate result of permitting the abandonment itself is a private benefit for the railroad in the form of savings realized by discontinuing uneconomic services. The justification lies in the benefit to the transportation system which the Commission concluded the abandonment would produce. There is nothing in the Act to prevent the Commission from taking action in furtherance of the "public convenience and necessity" merely because the total impact of that action will include benefits to private persons, either carriers or employees. The *Lowden* case specifically recognized that the imposition of conditions similar to those sought here might strengthen the national system through their effect on the morale and stability of railway workers generally. Exactly the same considerations of national importance are applicable and operative here.

We must also reject the further argument that Congress has ratified the Commission's construction of Section 1(18)-(20). It is true that Congress made no changes in Section 1(18)-(20) of the Interstate Commerce Act in passing the Transportation Act of 1940, and that the annual reports of the Commission to Congress in 1935 and 1936 had specifically asked "for further statutory provi-

sions to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications." But the *Lowden* case, clearly establishing that the Commission's 1935 and 1936 doubts about its powers with respect to unifications were erroneous, was decided on December 4, 1939. Congress could with good reason have concluded that the principle of the *Lowden* case was equally applicable to abandonments. In any event, the contrary conclusion—that abandonments were now to be distinguished although the Commission had made no such distinction in presenting the problem to Congress and that Congress approved such a distinction—is at best the product of a set of inferences none of which is free from doubt. We therefore cannot impute to Congress's failure to amend Section 1(18)-(20) the significance which the petitioners contend it should have.

Nor is the petitioners' contention strengthened because Congress did modify Section 5(4) in the Transportation Act of 1940. The modifications, so far as relevant here, merely made mandatory with respect to unifications the protections for workers that had previously been discretionary.[1] See *Lowden* v. *United States, supra*, 239. To regard them as a restriction on the discretionary power of the Commission with respect to abandonments is not merely illogical. It requires us to impute to Congress a policy of mandatory protection for labor in unifications and no protection at all in abandonments. It is reasonable to suppose that if Congress had intended to make such a distinction, it would have said so more explicitly.

The petitioners have made further arguments based on the statutory history of the Transportation Act of 1940, relying upon

[1] "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees." 54 Stat. 906-907.

incidental and sporadic references in committee hearings and reports to the protection of labor in connection with abandonments. We have reviewed those references, and have found that they raise inferences too ambiguous to support the conclusion that Congress has ratified the Commission's construction of Section 1(18)-(20).

It is also urged that we should not disturb the Commission's construction of the abandonment provisions for the reason that administrative interpretations by the agency charged with the enforcement of a statute are entitled to great weight. But as we have pointed out, the construction placed upon Section 1(18)-(20) by the Commission is not only hostile to the major objective of the Act and inconsistent with decisions of this Court, but irreconcilable with its own interpretations of Section 5(4). Under such circumstances, we believe the court below was amply justified in refusing to accept the Commission's construction. Cf. *Mitchell* v. *United States*, 313 U. S. 80; *City Bank Co.* v. *Helvering*, 313 U. S. 121.

We therefore conclude that the Commission has authority to attach terms and conditions for the benefit of employees displaced by railroad abandonments. Whether such terms and conditions should be attached in this case and if so their nature and extent are questions for the Commission to decide in the light of the evidence. The judgment of the court below should accordingly be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.